



C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4^e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Canadian Airport Workers Union,

complainant,

and

Garda Security Screening Inc.,

respondent.

Board File: 28785-C

Neutral Citation: 2011 CIRB 593

June 13, 2011

On May 27, 2011, the Canadian Airport Workers Union (CAWU or the union) filed an application under section 92 and a complaint under section 94 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*), alleging, among other things, that Garda Security Screening Inc. (Garda or the employer) was engaging in a lockout of its employees.

The application for a declaration of illegal lockout was heard by a panel of the Canada Industrial Relations Board (the Board) composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members, in Toronto, Ontario, on May 31, 2011 and the parties were notified on June 7, 2011 that the application had been dismissed. These are the reasons for that decision.

Appearance

Messrs. Harold F. Caley, Denis W. Ellickson and Doug Wray, for the Canadian Airport Workers Union;

Mr. Michel A. Brisebois, for Garda Security Screening Inc.

I-Background

[1] Garda is a security services supplier (subcontractor) to the Canadian Air Transport Security Authority (CATSA). Under various contracts with CATSA, Garda employs some 3300 screening officers working at 25 airports in Canada. There are approximately 1650 to 1700 Garda employees providing pre-board security screening services under contract to CATSA at the Pearson International Airport, Toronto City Centre (Billy Bishop) Airport and Buttonville airport in Ontario. These employees are represented by the CAWU (Board order no. 9607-U).

[2] Garda and the CAWU are parties to a collective agreement with an expiry date of March 31, 2012. Among other things, this agreement provides that a basic work week may consist of (8) eight, (10) ten or (12) twelve hour shifts (Article 9.1); that the employer does not guarantee to provide work for any employee or to maintain the work week or hours of work at any time in effect (Article 9.8); and that employees who work less than 24 hours per week on a regular schedule are considered to be part-time (Article 7.1(b)). Employees who work less than 40 hours per week can request extra hours, provided they have the qualifications to perform the available work (Article 7.5). The collective agreement also provides that an employee will lose his/her seniority and employment for various reasons, including failure to notify their supervisor of their intention to return to work within five days of being given notice of recall, or failing to return to work on the date for which they were recalled (Article 8.1(e)).

[3] In April 2010, the parties negotiated a Letter of Understanding (LOU No. 7) in order to assist the employer in staffing during peak periods. LOU No. 7 is part of the collective agreement and provides that employees hired on or after January 1, 2010 may, on a voluntary basis, be scheduled to work a (4) four hour shift to cover peak periods. Differences over the interpretation or application of LOU No. 7 can be grieved and taken to arbitration.

[4] Garda's current contract with CATSA provides for 47,000 hours per week, but in early May 2011, CATSA unilaterally imposed a reduction of 5,000 hours per week, effective May 30, 2011. Garda was later successful in obtaining an extension of the effective date of this reduction to June 13, 2011.

[5] Representatives of Garda and the CAWU met on a number of occasions during the week of May 16, 2011, and discussed various alternatives to achieve the reductions mandated by CATSA. No agreement was reached and on May 24, 2011, Garda began to issue lay off notices. Ultimately, Garda notified the bottom 246 employees on the seniority list that they would be laid off as of June 13, 2011. Of this group, 231 employees were part-time and 15 were junior full-time employees.

[6] In addition to the lay-off of the junior full and part-time employees, Garda gave notice to a further 190 full-time employees that they would be laid off as of June 8, 2011. However, Garda concurrently issued recall notices to these individuals, offering them a work schedule of four hours per day for a five-day week (i.e., 20 hours per week) commencing June 9, 2011. The recall letter indicated that the provisions of section 8.1(e) of the collective agreement applied to this recall.

[7] The union alleges that, in taking these actions, Garda is attempting to force employees to accept concessions that the CAWU had refused to agree to, namely reduced hours and/or split shifts. It further alleges that these actions constitute a lockout.

II—Positions of the Parties

[8] The parties agree that, as the requirements of section 89(1) of the *Code* have not been met with respect to this bargaining unit, any strike or lockout at the present time would be unlawful.

A—CAWU

[9] The union alleges that, by unilaterally reducing the hours of work of approximately 190 employees after the union had refused to consent to various employer proposals that would have required amendments to the collective agreement, the employer has effectively refused to continue to employ these employees in order to compel them to agree to different terms and conditions of employment, and has thus engaged in an illegal lockout.

[10] The union states that it only agreed to LOU No. 7 on three conditions: that it applied to persons newly hired after January 1, 2010; that it was voluntary; and that employees hired before

January 1, 2010 were protected. It says that, following the reduction notice from CATSA, the employer made a number of efforts to persuade the union to agree to alternatives but that the union did not find any of the proposed alternatives acceptable and advised the employer to follow the existing collective agreement.

[11] According to the union, lay-offs must be by reverse order of seniority, and that those with the least seniority should be the first to be laid off. It contends that the employer has not complied with this principle, since those with the least seniority were laid off as of June 13, 2011, while those with greater seniority were laid off as of June 8, 2011. Furthermore, the union contends that by offering part-time hours to the laid off full-time employees as of June 9, 2011, the employer has unilaterally reduced their shifts from (8) eight hours to (4) four hours in violation of the collective agreement and LOU No. 7. The union alleges that, as a result of this series of transactions, Garda has converted 190 full-time employees to part-time status against their wishes and also created split shifts. The union further alleges that the employer has coerced these laid off full-time employees by threatening that they will lose their seniority and employment if they refuse to accept recall to the (4) four hour shifts.

[12] The union accepts that there is an economic need to reduce the hours provided under the CATSA contract, but argues that the CATSA directive is not an excuse for ignoring the collective agreement. It suggests that the existence of LOU No. 7 is evidence that the employer requires the union's agreement to offer (4) four hour shifts. The union submits that employees are being recalled to positions with inferior hours and benefits and therefore, the employer has unilaterally changed their status and compelled the employees to accept this change by threatening them with the loss of their employment if they refuse to accept recall to these inferior positions.

[13] In support of its contention that the employer's actions constitute an illegal lockout, the union cited a number of decisions of this Board, and its predecessor, the Canada Labour Relations Board (CLRB). In *Cable TV Limited* (1979), 35 di 28; [1980] 2 Can LRBR 381; and 80 CLLC 16,019 (CLRB no. 188), the CLRB found that the employer had instituted lay-offs as a pressure tactic to force the employees to accept its offers. In *Murray Hill Limousine Services Ltd.* (1986), 66 di 171 (CLRB no. 582), the CLRB found that the employer's refusal to recall certain employees to work

that was available constituted coercion to force the union to agree to changes in the existing working conditions. In *Maritime Employers Association*, 2000 CIRB 77, the Board held that an employer's refusal to apply the terms of a new collective agreement was unlawful, as it was intended to force the union to agree to the employer's interpretation of a particular provision of the new agreement. In *Vidéotron Télécom Ltée*, 2002 CIRB 190, the Board found that the employer's decision to deny the employees access to the workplace during the 72-hour lockout notice was unlawful, even though the employer continued to pay the employees during this period.

[14] The union also cited decisions of the Ontario and Alberta labour relations boards in support of their contention that Garda's actions were unlawful. In *CUPE 1075 v. Camrose School District 1315*, [1988] Alta. L.R.B.R. 164, the employer advised the union two months prior to the expiry of the collective agreement that the terms of employment contained in that agreement would be discontinued as of its expiry date and would be determined unilaterally by the employer thereafter unless the parties reached agreement prior to that date. Two weeks prior to the expiry date, the employer advised the employees that it would unilaterally establish lower wage rates and other terms of employment as of the agreement expiry date. When the employer proceeded to follow through on this advice, the Alberta Labour Relations Board (ALRB) found that the employer had engaged in an illegal lockout because it had not complied with the notice requirements in the applicable provincial statute.

[15] In *Union of Calgary Co-op. Employees v. Calgary Co-op Assn.*, [1993] Alta. L.R.B.R. 335, the parties were halfway through a two-year collective agreement when the employer initiated discussions with the union in an effort to reduce its labour costs to meet competitive and financial pressures. When these discussions proved unproductive, the employer distributed its proposal directly to the employees and informed them that, if the proposal was not accepted, it would unilaterally reduce the hours of senior employees and replace them with new employees. The Board found that, although the employer's original purpose was legitimate, when it presented its position to employees as a "take it or leave it" proposal, the elements of a lockout—to compel the employees to accept terms and conditions of employment—were established.

[16] In *C. E. Lummus Canada Ltd.*, [1983] OLBR Rep. October 1688, the employer was a multi-trade construction company subject to a provincial collective agreement. The employer and its client became concerned about cost overruns, which were attributed to a decline in productivity on Fridays among employees in a particular trade. After unsuccessfully attempting to address the issue with the various trades on site, the employer advised all of the unions and employees that the job site would be scheduled for a (4) four-day work week at the direction of the client, unless agreement was reached to the contrary. In finding that the employer's actions constituted an unlawful lockout, the Ontario Labour Relations Board observed:

16. ... Nor can pressure from an owner/client to cut costs, by itself, provide justification for attempting to do so in an unlawful way, if the Board finds the requisite motive for a "lock-out" still to exist. ...

(page 1696)

[17] The union seeks a declaration that the employer's actions in this case constitute an illegal lockout and an order that Garda cease and desist from causing such a lockout by revoking the lay-off notices that have been issued and implementing any lay-offs in accordance with the collective agreement. The union also asks that the Board order the employer not to implement split shifts or mandatory (4) four-hour shifts.

B-Garda

[18] The employer denies causing a lockout and claims that it was merely applying the terms of the existing collective agreement. It points out that, because it is a subcontractor to CATSA, the collective agreement contains considerable flexibility. In this regard, it points out that no specific hours of work are set out in the collective agreement, nor is there a guarantee of work or that the employer will maintain the hours of work or work week in effect at any particular time (Article 9).

[19] The employer submits that, when it received notice from CATSA of the 5,000 hour per week reduction, it approached the union to discuss mechanisms through which this cut could be implemented. When these talks were not successful, the employer contends that it implemented the lay-offs in accordance with the collective agreement. Garda states that, by laying off the junior employees, it lost the personnel who were filling the (4) four-hour shifts that had been created to

cover peak periods. It therefore offered these part-time positions to the more senior full-time employees who were being laid off. The employer admitted that it may have made some errors in the timing of the layoffs, but that this is a matter for a grievance arbitrator under the collective agreement and not an illegal lockout.

[20] Based on the attrition rate at the airports, the employer estimates that all of the full-time employees who received lay-off notices will be recalled to work, although not necessarily to scheduled full-time hours. The employer points out that employees who work less than 40 hours per week can request extra hours and thereby make up the time. However, the employer admits that doing so may result in what the union is characterizing as "split shifts," since the extra hours are not necessarily continuous with the employee's scheduled hours of work. The employer advised the Board that it has already created 54 new full-time positions (based on (4) four shifts of (10) ten hours per day) by combining work from different terminals and that it has posted these positions.

[21] The employer argues that its recall letter to the employees who had been laid off from full-time work was not intended as a threat, and that the employer was merely drawing the employees' attention to Article 8.1(e) of the collective agreement, which provides that failure to accept recall would result in loss of seniority and employment. The employer submits that this letter was not an attempt to compel the employees to agree to different terms or conditions of employment, but that it was simply trying to follow the collective agreement.

[22] The employer directed the Board's attention to three decisions of the CLRB that it contends are relevant to this matter. In *Canadian Broadcasting Corporation (Ciné Le Matou Inc.)* (1987), 71 di 12 (CLRB no. 646), the CLRB held that the temporary assignment, by the employer, of (6) six bargaining unit members to a co-production, without any change in their working conditions, did not constitute a lockout. In *Radio Futura Limitée (CKVL/CKOI)* (1992), 87 di 7; and 16 CLRBR (2d) 152 (CLRB no. 913), the union alleged that the employer's notice of lay-off to 27 employees, without the union's agreement and contrary to the provisions of the collective agreement, was aimed at compelling the employees to agree to amendments to the collective agreement and thus constituted an unlawful lockout. The CLRB was not persuaded that the lay-off was intended to compel the employees to agree to amended terms of employment and dismissed the complaint. In

Coopérative des travailleurs routiers, Trans-Coop (1996), 101 di 159 (CLRB no. 1170), the CLRB dismissed an application alleging an illegal lockout when the union failed to prove that the employer's closure of one of its depots was done with the intention of forcing employees to accept changed working conditions.

[23] The employer asks the Board to dismiss the application for a declaration of illegal lockout.

III-Analysis and Decision

[24] The *Code* defines "lockout" as follows:

"lockout" includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of their employees, done to compel their employees, or to aid another employer to compel that other employer's employees, to agree to terms or conditions of employment.

[25] It is generally agreed that this definition contains both an objective element and a subjective element: the act and the motive or purpose for the act. As the Ontario Labour Relations Board (OLRB) observed in *Dep't Store Union v. Humpty Dumpty Ltd.*, [1977] 2 Can LRBR 248:

... In order to establish that a lockout has occurred it is not sufficient merely to show that there has been a closing of a place of employment, or a suspension of work or a refusal by an employer to continue to employ a number of his employees (i.e., plant closure, relocation, layoff or contracting out of work etc.). It must also be established that any of these acts was done by the employer with a view to induce or compel *his employees* to refrain from exercising any rights or privileges under the Act or to agree to provisions or changes in provisions respecting terms and conditions of employment etc. **Motive is an integral component of the definition and as a result the economic consequences are not in themselves determinative of the issue.** ...

(pages 253, emphasis added)

[26] The lesson to be learned from the cases relied upon by the union and the employer, as described above, is that each situation must be examined on its own merits. In this case, the Board is asked to determine whether the lay-off of a number of full-time employees and the subsequent offer to them of recall to part-time work, which occurred after the employer and the union were unable to agree upon amendments to their collective agreement to allow the employer to comply with its client's demand for a reduction in weekly hours of work, constitutes a lockout.

[27] The nature of the problem posed by this application was well expressed by the OLRB in *C. E. Lummus Canada Ltd.*, *supra*:

11. The point raised is a difficult one. Given the definition of "lock-out", an employer who speaks during the term of a collective agreement of the need for concessions as a condition of further employment must be mindful of the basic structure of our *Labour Relations Act*. During the term of a collective agreement, an employer is not entitled to simply say, "I want a better deal, and I'm not going to continue to use your services, or part of your services, until I get it". That is prohibited as an untimely "lock-out", just as the opposite conduct on the part of employees and a trade union is prohibited as a "strike". On the other hand, an employer may, from time to time, find himself in a position where economic necessity has raised the specter of management decisions which will significantly impact on the employment opportunities of his employees. In such circumstances, it would seem to make labour relations sense to permit the employer to invite the bargaining agent to engage in meaningful discussion designed to avoid or minimize such impact, and indeed, this has been a main theme of the Board's "bargaining in bad faith" cases in recent times. Compare *Westinghouse Canada Limited*, [1980] OLRB Rep April 577; *Sunnycrest Nursing Home*, [1982] OLRB Rep Feb. 261; and *Consolidated Bathurst*, [1983] OLRB Rep Sept. 1411. The Board's interpretation of the law ought not simply to deny the employees, through their trade union, (or employee bargaining agency as the case may be) this opportunity for input in every case where the problem comes to a head during the term of the collective agreement itself. But, as noted, a fundamental prohibition exists against "lock-outs" or threatened "lock-outs" during the term of the collective agreement, just as it does for "strikes", and the Board must be scrupulous in its analysis of each case, lest a plea of "economic circumstance" be used to mask an attempt simply to obtain better terms and conditions than have been agreed upon in the collective agreement. The Board recognizes that the issue of "economic necessity" can be a complex one, making a judgment on the employer's true motivation difficult; but the Board cannot shy away from making such judgments, if employees through their bargaining agent are to be permitted an opportunity to exercise some degree of control over their economic lives, on the one hand, and the identification and control of unfair labour practices, engaged in under a cloak of "economic necessity", is to be achieved on the other.

(page 1694)

[28] The parties take different views of the intent of the discussions that took place in May 2011, subsequent to the CATSA notice of reduced hours. The Board notes that section 67(2) of the *Code* contemplates mid-term bargaining, although the parties have no right to strike or lockout if this type of bargaining fails. Garda's effort to engage the union in discussions that included possible revisions to the collective agreement was therefore expressly authorized by the *Code*. Therefore, the question in this case as to whether or not the employer's subsequent actions constitute an illegal lockout turns on the employer's intent in issuing the lay-off and recall notices: was it an impermissible attempt to compel the employees to agree to changes in their terms and conditions of employment, or was it a legitimate attempt to implement the provisions of the collective agreement in order to give effect to the reduction in hours that had been mandated by the client?

[29] Having carefully considered the parties' respective submissions, the Board is not persuaded that the employer's actions were motivated by an intent to induce or compel the members of the bargaining unit to agree to changes in the provisions of the collective agreement respecting their terms and conditions of employment. When the May 2011 discussions with the union were unproductive, the employer abandoned its efforts to obtain revisions to the collective agreement and implemented the lay-offs that its calculations suggested were necessary. The fact that the union disagrees with the employer's calculations or the manner in which the lay-offs were implemented does not make those lay-offs unlawful under the *Code*. The question of whether the employer implemented the lay-offs in a manner that constitutes a violation of the collective agreement is a matter for an arbitrator to determine, and the Board expresses no opinion on the union's allegations in this regard. However, the Board is satisfied that the employer did not have an improper motive, within the meaning of the *Code*, when it decided to proceed with the lay-off and recall notices.

[30] The application for a declaration of illegal lockout is dismissed. If the union wishes to pursue the portion of its complaint alleging violation of section 94 of the *Code*, it must notify the Board **within 15 days of this decision** or the file will be considered closed.

[31] This is a unanimous decision of the Board and it is signed on its behalf by

Elizabeth MacPherson
Chairperson

André Iecavalier
Member

Norman Rivard
Member